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Intelligence agencies and the State secret privilege: the Italian experience

The Italian security regime has recently experienced an important overhaul through the adoption of Law 124/2007 on intelligence agencies and the State secret privilege.¹ This piece of legislation was enacted after a lengthy parliamentary debate and exactly 30 years after Law 801/1977, which regulated the field until the implementation of the new law.² The awareness of the need to update the Italian legislation on secret services and intelligence activities had risen in recent years, as a consequence of both the changed international context (especially after the terrorist attacks of 9/11 in the United States) and some well-known judicial investigations concerning the involvement of the Italian intelligence apparatus in unlawful activities (such as the extraordinary rendition of Milan's radical imam Abu Omar) coordinated by foreign intelligence agencies.³

The recently enacted law contains several innovative elements. At the same time, however, it also shows signs of continuity with the previous legislation. In particular, the Italian legislation on intelligence agencies and the State secret privilege currently features: a) the increased importance of the President of the Council as the head of the intelligence apparatus and the creation of an *ad hoc* security committee within the executive branch; b) the maintenance of a 'double track' system with a separation between an external and an internal intelligence agency; c) the granting of a special *status* to the agents operating under the aegis of the intelligence agencies, e.g. through functional guarantees against judicial investigations; d) the strengthening of the intelligence oversight mechanisms, within the executive branch, the legislature and the judiciary – with a special role for the Constitutional Court; e) the creation of special procedures regulating the assertion of the State secret privilege.

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- 1 For a commentary to Law 124/2007 cfr. TF Giupponi, 'Servizi di informazione e segreto di Stato nella legge n. 124/2007' [2009] Forum Quaderni Costituzionali <http://www.forumcostituzionale.it/site/images/stories/pdf/documenti_forum/paper/0161_giupponi.pdf> last accessed 20 May 2010 and F Sidoti, 'The Italian Intelligence Service', in T Jäger and A Daun, *Geheimdienste in Europa* (VS Verlag für Sozialwissenschaften, 2009), 78. On the Italian security regime more broadly cf. TF Giupponi, *Le dimensioni costituzionali della sicurezza* (Bonomo, Bologna, 2010).
 - 2 For an overview of the previous legal regime and for an assessment of some of the reasons in favour of an overhaul of the legislation regulating the Italian intelligence agencies cf. VF Pisano, 'The Italian Intelligence Establishment: A Time for Reform?' [2002] 21 Penn State Int'l L. Rev. 263; M Savino, 'Solo per i tuoi occhi? La riforma del sistema italiano di intelligence', [2008] *Giornale diritto amministrativo* 121.
 - 3 Cf. M Nino, 'The Abu Omar Case in Italy and the Effects of CIA Extraordinary Renditions in Europe on Law Enforcement and Intelligence Activity' [2007] *Revue Internationale de Droit Pénal* 113; TF Giupponi, 'Il conflitto tra governo e procura di Milano nel caso Abu Omar' [2007] *Quaderni Costituzionali* 384.

The purpose of this paper is to provide a general introduction to the Italian legal framework in the field of intelligence agencies and State secret privilege. To achieve this purpose, the analysis will be structured as follows. Section I analyzes the constitutional principles which are regarded as the basis for the activities of the intelligence agencies and for the existence of a State secret privilege. Section II outlines the organization of the Italian intelligence apparatus. Section III deals with the role of the judiciary and the special *status* granted to the members of the intelligence agencies. The issue of oversight mechanisms for the activities of the intelligence agencies forms the core of Section IV. Sections V and VI examine the practical operation of the State secret privilege and the legal warranties set up against its abuse. The paper concludes by providing an outline of the well-known Abu Omar case, in particular by underlining the main conclusions reached by the Constitutional Court in its recent decision n. 106/2009.

I. CONSTITUTIONAL FOUNDATIONS FOR THE ACTIVITIES OF THE INTELLIGENCE AGENCIES AND THE STATE SECRET PRIVILEGE

The activity of the intelligence agencies raises several issues of constitutional relevance. On the one hand, the functions, the organization and the responsibilities of the intelligence agencies are peculiar and quite distinct from those of other regular administrative bodies. On the other hand, intelligence agencies operate within a constitutional system based on the rule of law and must be subject to forms of overview. In contemporary liberal democracies, therefore, the basis for the activities of intelligence agencies can neither be found in the principle of the '*raison d'Etat*' – unlike in the *ancient régime* – nor in a hypothetical 'State of necessity' doctrine empowering the State to employ any means in the achievement of its purposes.⁴ Rather, it is a common opinion among Italian constitutional scholars that it is the Constitution,⁵ as the fundamental law, that sets the justification and the limits for the operation of intelligence agencies.⁶

From an operational view point, the activity of intelligence agencies aims at gathering information which is useful for the safeguarding of the independence and the integrity of the State externally and for the protection of the State and its democratic institutions internally. This is why constitutional scholars usually identify the foundations of the activity of intelligence agencies on two constitutional provisions (sometimes in combination with other provisions of the 1948

4 Cf. the classical study of F Meinecke, *Die idee der Staatsräson in der neueren Geschichte* (1924). For a historical perspective of the role of intelligence agencies cf. C Mosca, 'Profili storici sui servizi di informazione e di sicurezza', in C Mosca, S Gambacurta, G Scandone and M Valentini (eds.), *I servizi di informazione e il segreto di Stato* (Giuffrè, Milano, 2008).

5 A translation of the Italian Constitution by C Fusaro is available in English at the International Constitutional Law web site <http://www.servat.unibe.ch/icl/it_indx.html> last accessed 20 May 2010.

6 Cf. also P Bonetti, 'Aspetti costituzionali del nuovo sistema di informazione per la sicurezza della Repubblica' [2008] *Diritto e società* 251.

Constitution):⁷ Art. 52, which states that "(1) The defence of the fatherland is the sacred duty of every citizen. (2) Military service is compulsory within the limits and under the terms of the law. The fulfilment of military duties may not prejudice a citizen's position as an employee, nor the exercise of his political rights. (3) The rules about armed forces must conform to the democratic spirit of the Republic"; and Art. 54, affirming that "(1) All citizens have the duty to be loyal to the republic and to observe the Constitution and the laws".

According to several scholars, the activity of the Italian intelligence can be based on the duty to be loyal to the Republic enshrined in Art. 54.⁸ This duty, however, would not operate in general for all citizens. Rather it would be a specific burden for those public officials vested with a peculiar security function. The intelligence activity, then, would be characterized by the purpose of ensuring the implementation of the Constitution and the laws of the Republic. Another group of constitutional scholars, as an alternative, argues that both Art. 54 and Art. 52 must be considered as the basis for the action of the secret services:⁹ while the first provision operates with regard to internal security, the latter would be the basis for the external action of intelligence agencies. The connection between the two provisions would concretize "a duty to defend the Republic and its fundamental institutions to ensure the possibility of remaining loyal to the values which are represented in it."¹⁰

Other constitutional scholars instead identify a constitutional *fiat* for intelligence agencies in the joint application of Art. 52 and Art. 5 of the Constitution, which proclaims that "the Republic, one and indivisible, recognizes and promotes local autonomy." In this vein, intelligence agencies are required to protect "the security of the State conceived as an independent, national, unified and indivisible Republic and as [...] a democratic polity – against any violent action contrary to the democratic spirit."¹¹ Notwithstanding these different interpretations, it appears that Art. 52 is generally regarded as the ground for the external activity of the intelligence agencies and for the distinct but related activity of military defence. The basis for internal intelligence activity is more controversial – not least because in this area the role of intelligence agencies partially overlaps with the ordinary function of ensuring public security.

Nonetheless, the activities of regular police forces and of secret services should not be confused: while the former are endowed with a general power of prevention of socially harmful events and of a *post hoc* competence to enforce security measures, the latter operate with the purpose of acquiring information and intelligence that can be helpful in the managing of national security. Despite the fact that today, intelligence agencies are increasingly endowed with operational

7 For an overview of several theories advanced by constitutional scholars in the field of intelligence agencies see A Poggi, 'Servizi di informazione e sicurezza', in *Digesto discipline pubblicistiche*, vol. XV (Utet, Torino, 1999) 77.

8 S Labriola, *Le informazioni per la sicurezza dello Stato* (Giuffrè, Milano, 1978) 46.

9 A Massera, 'Servizi di informazione e di sicurezza', in *Enciclopedia del diritto*, vol. XLII (Giuffrè, Milano, 1990) 396-397.

10 G Cocco, *I servizi di informazione e di sicurezza nell'ordinamento italiano* (Cedam, Padova, 1980) 50.

11 A Anzon, 'Servizi segreti', in *Enciclopedia giuridica*, vol. XXVIII, (Treccani, Roma, 1992) 1.

duties that require officials of the secret services to engage in practical police-like activities, the role of intelligence agencies should be preparatory to the action of other security agencies and focused on the gathering of intelligence.¹² As such, the constitutional basis for their activities should be identified *ad hoc*, rather than in the legal principles that legitimize normal State policing.

Similar problems of constitutional relevance arise with regard to the legal basis of the State secret privilege. In general terms, democratic constitutions oppose the tradition of the *arcana imperii* and proclaim the idea of transparency and accountability of powers towards the sovereignty of the people.¹³ In addition, freedom of information, the right to access to court and the independence of the judiciary are fundamental principles that the Constitution enshrines. Nonetheless, while in the public sphere openness should be the rule and secrecy only the exception, a constitutional justification for the existence of a State secret privilege can still be identified. At the same time, any rationalization of the existence of a State secret needs to be placed in context with the liberal values and democratic principles that sustain the constitutional system.

Constitutional scholars have identified the constitutional interests protected by the State secret privilege in the defence of the external and internal security of the State. However, whereas most academics agree that Art. 52 of the Constitution can be considered as the reference norm for the State secret in its external dimension (hence connected with military defence),¹⁴ disagreement exists with regard to the State secret privilege in its internal dimension. Several researchers emphasize the role of Art. 54 and the duty to remain loyal to the Republic.¹⁵ Others, instead, identify the basis of the privilege in the joint operations of Art. 52 and Art. 54, just as previously described with regard to intelligence agencies.¹⁶ The Constitutional Court has offered a different interpretation by identifying a compound constitutional foundation of the State secret.¹⁷

In decision n. 82/1976, the Court recognized that the protection of the State secret is consistent with the "interest of the State in its international personality, that is, the interest of the State in its territorial integrity, independence and – at the extreme – in its survival. An interest that is present and preeminent in all constitutional systems, irrespective of the political regime, and that in the [Italian] Constitution is enshrined in the emphatic formula of Art. 52." The Court later developed and explained this reasoning in its decision n. 86/1977: in this ruling the basis of the State secret privilege was detected not only in Art. 52, but also in the provisions of Art. 126 of the Constitution (which allows for the dissolution of regional councils and the dismissal of the President of the regions for "reasons

12 Cocco (n 10) 71.

13 For a masterpiece description of the principle of transparency and accountability in liberal democratic constitutions cf. N Bobbio, 'La democrazia e il potere invisibile', [1980] *Rivista italiana scienza politica* 181.

14 A Anzon, 'Segreto di Stato e Costituzione', [1976] *Giurisprudenza costituzionale* I, 1784; P Pisa, *Segreto di Stato. Profili penali* (Giuffrè, Milano, 1977) 213.

15 S Labriola, 'Segreto di Stato', in *Enciclopedia del diritto*, vol. XLI (Giuffrè, Milano, 1989) 1030.

16 P Barile, 'Democrazia e segreto', [1987] *Quaderni costituzionali* 37.

17 For a commentary to the case law of the Constitutional Court in the field of State secrecy see Giupponi (n 1) 6 and the literature cited therein.

of national security") and especially in Art. 5 and Art. 1, which states that "(1) Italy is a democratic republic based on labour. (2) The sovereignty belongs to the people, who exercise it in the forms and limits of the Constitution."

In the words of the Court, "it is in relation with all these norms that it is possible to speak of an internal and external security of the State, of a need to protect it against violent actions that contrast the democratic spirit which inspires our constitutional structure and the supreme interests valid for all societies organized in a State [...]. For these reasons the institutional interests [protected by the State secret privilege] shall relate to the State conceived as a community and never overlap with the interests of the Government and of the political parties supporting its activities." In conclusion, on the basis of the jurisprudence of the Constitutional Court, a compound constitutional basis exists for a State secret privilege. This instrument, however, must be employed to protect national security against subversive action, and not to foster the interests of political majorities.

II. THE ORGANIZATION OF INTELLIGENCE AGENCIES

With regard to the organization of the Italian intelligence apparatus, Law 124/2007 has confirmed and emphasized the leading role of the President of the Council – Italy's Prime Minister. The President of the Council has the exclusive "high direction and the general responsibility over the work of intelligence agencies, in the interest of the Republic and its democratic institutions."¹⁸ To this end a special committee – the Department on Security Intelligence (DIS) – has been set up within the executive branch.¹⁹ The DIS coordinates all intelligence activities, functions as a support to the President of the Council and operates as a link between the activity of the intelligence agencies and the military, the regular police forces and the other public administrations. The DIS elaborates strategic analyses, reports and forecasts for the President of the Council.²⁰

The internal structure of the DIS comprises a Database Office – in charge of managing and preserving the intelligence; the Office of the Inspector General – in charge of evaluating and controlling the work of the intelligence agencies; and a special school for the technical preparation of intelligence personnel. The DIS also includes a Central Secrecy Office (UCSE), which coordinates, advises and controls the rules concerning the application of the State secret privilege and grants authorizations for the disclosure of information regarded as confidential. Outside the structure of the DIS, an Inter-Ministerial Committee for the Security of the Republic (CISR) is endowed with an advisory function.²¹ The CISR is not, however, involved in enforcement policies and its importance is significantly diminished by being convened at the discretion of the President of the Council.

¹⁸ Law 124/2007, Art. 1(1)(a).

¹⁹ *Id.*, Art. 4.

²⁰ On the role of the DIS cf. A Corneli, 'Coordinamento assicurato dal Dipartimento per la sicurezza' [2007] 40 *Guida al diritto* 50.

²¹ Law 124/2007, Art. 5.

Law 124/2007 has increased the competences of the President of the Council by other means also. The President is now competent to nominate and remove the officers of the DIS – including the General Director of the DIS, under whose guidance the DIS operates – to decide the budget and to adopt regulations regarding the organization of intelligence agencies. Art. 43 of the Law, in fact, gives to the Chief Executive, with the advice of the CISR, the power to adopt regulations "which are necessary for the organization and the functioning of the intelligence apparatus": the President of the Council, in particular, can adopt decrees, even in derogation from the existing rules establishing the normative power of the executive.²²

In addition, the central role of the President of the Council in intelligence matters is fostered by the termination of all the direct links that used to connect the intelligence agencies to the Ministry of Defence and to the Ministry of Interior. Law 801/1977 had, in fact, divided the intelligence apparatus into two agencies: the Intelligence Service for Military Security (SISMI) and the Intelligence Service for Democratic Security (SISDE). Although the President of the Council already enjoyed wide power to direct and coordinate the activities of the two intelligence agencies – also via an Executive Committee for Intelligence and Security (CESIS) set up within the Presidency of the Council – the Law made the two agencies formally dependent on, respectively, the Ministry of Defence and the Ministry of Interior. Since this situation had created several problems of coordination, though, Law 124/2007 has changed this state of affairs and centralized all powers in the Chief Executive.

The new legislation has replaced the SISMI and the SISDE. However, it has maintained the separation between two intelligence agencies: hence, currently, the Italian intelligence apparatus comprises an Agency for Internal Security (AISI) and an Agency for External Security (AISE). It is the responsibility of the AISE to "search and elaborate intelligence which is useful for the defence, the integrity and the security of the Republic, also with regard to international agreements and the threats generating from abroad"²³. The AISE is also involved in counter-proliferation activities and in all counter-intelligence operations taking place outside the national territory. The task of AISI, instead, is to "search and elaborate intelligence which is useful to safeguard [...] the internal security of the Republic and the democratic institutions against any threat originating from subversive activities and criminal or terrorist attacks."²⁴ The AISI has competence over all counter-intelligence operations taking place within the national territory.

From this point of view, Law 124/2007 divides the competence between the AISE and the AISI only in the light of the origin of the threat and the territorial sphere of operation of the two agencies. While the former acts externally (i.e. abroad), the latter acts internally (in Italy).²⁵ The legislation, in fact, prohibits the two agencies from operating outside their sphere of competence, unless

22 For a critical comment see A Pace, 'L'apposizione del segreto di Stato nei principi costituzionali e nella legge n. 124/2007' [2008] *Giurisprudenza costituzionale* 4047.

23 Law 124/2007, Art. 6.

24 *Id.*, Art. 7.

25 PL Vigna, 'La nuova disciplina dei servizi di sicurezza', [2007] *Legislazione penale* 700.

expressly authorized to do so by the DIS.²⁶ The 'geographical' criterion utilized by Law 124/2007 to separate the competences of the AISE and the AISI, however, has also a functional implication: whereas the AISE tackles threats concerning the security of the State mainly from a military perspective, the AISI is specialized in counter-terrorism and other intelligence activities relating to domestic criminal groups.²⁷

Although all the intelligence activities for national security are entrusted exclusively to the AISE and the AISI,²⁸ the recent legal reform has been taking care to ensure the coordination of the two agencies with other bodies operating in the field of internal and external security. To this end, the DIS operates as a hub between the AISE and the headquarters of the Ministry of Defence.²⁹ The relationship between the AISI and the ordinary police forces is, however, more complex. As mentioned above, today there is *de facto* an increasing overlap between the fields of operation of intelligence agencies and regular police forces – mostly in counter-terrorism activities.³⁰ Given this situation, Law 124/2007 requires the DIS to constantly exchange information between the AISI, the police and the other institutions fighting organized crime (such as, e.g., the Strategic Counter-Terrorism Committee set up within the Ministry of Interior).³¹

In contrast to the previous legislation, Law 124/2007 has designed a special selection process for the personnel operating in the two intelligence agencies.³² Whereas under the previous system most officers were transferred to the intelligence agencies from the military and the police forces, today the staff of both the AISE and the AISI is hired directly by the DIS, in an open and competitive selection procedure. A number of incompatibilities are provided by the law: hence neither elected officials (at the national, European, regional and local level) nor judges, journalists or priests can work as intelligence officers.³³ In this way, the law pursues the objective of ensuring the independence of constitutional bodies and freedom of information and of religion against undue pressures originating from within the intelligence apparatus.

III. THE ACTIVITIES OF INTELLIGENCE AGENCIES AND THE RULE OF LAW: THE RELATIONSHIP BETWEEN THE JUDICIARY AND INTELLIGENCE AGENTS

The activities of intelligence agencies should take place within the framework of the law. As a number of cases from the past demonstrate, however, on several

26 Law 124/2007, Art. 6(4) and Art. 7(4).

27 Bonetti (n. 6) 264.

28 Law 124/2007, Art. 8(1).

29 Id., Art. 8(2).

30 Cf. also ML Di Bitonto, 'Raccolta di informazioni e attività di intelligence', in R.E. Kistoris and R. Orlandi (eds.), *Contrasto al terrorismo interno e internazionale* (Giappichelli, Torino, 2005) 253.

31 Law 124/2007, Art 12. Cfr. also TF Giupponi, 'Servizi di informazione e forze di polizia dopo la legge n. 124/2007' (2009) 10 *Astrid Rassegna* <www.astrid-online.it> last accessed 20 May 2010.

32 M Valentini, 'Il regime giuridico del personale', in C Mosca, S Gambacurta, G Scandone, M Valentini (eds.), *I servizi di informazione e il segreto di Stato* (Giuffrè, Milano, 2008) 149.

33 Law 124/2007, Art. 21.

occasions the secret services acted illicitly and even against national security interests. In light of this, Law 124/2007 has introduced a new and detailed discipline of the relationship between the intelligence agencies and the judiciary, which significantly overhauls what was previously an under-regulated sector. Law 801/1977, in fact, had only stated that intelligence officers had a duty to report criminal behaviours to the head of the intelligence agency, who was then required to communicate these to the Office of the Public Prosecutor. The President of the Council had, however, the power to delay this communication for a limited period of time.

Law 124/2007, on the contrary, introduced several new provisions, mostly as amendments to the Italian Code of Criminal Procedure (CCP). To begin with, Art. 118-bis CCP³⁴ allows the President of the Council to request from the judiciary, for all activities connected with the intelligence security of the Republic, the transfer of information and documents related to pending criminal investigations. The Public Prosecutor can, however, reject the request of the President of the Council, if this might jeopardize its investigations. Moreover, on the basis of Art. 256-bis CCP,³⁵ the judicial authority can order the attainment of documentary materials from the premises where the intelligence agencies are lodged. To this end a judicial order of disclosure indicating with the greatest detail possible the documents, acts or objects to be disclosed is required. The President of the Council, nevertheless, has to produce a specific authorization for the disclosure of confidential documents which originated from foreign intelligence agencies.

With regard to intelligence personnel, Law 124/2007 contains a number of specific rules which aim at balancing, on the one hand, the need to protect the secrecy of intelligence sources and, on the other, the objectives of a fair and effective criminal investigation and trial. Hence, the judicial authority must adopt all possible precautions to ensure that, when officers of the intelligence agencies are summoned, their privacy can be guaranteed by means of closed-door hearings or by video-conference.³⁶ The acts of a criminal investigation concerning an intelligence officer must also be archived as confidential. Finally, to avoid the disclosure of secret information, interception of communications concerning intelligence officers can be utilized in judicial proceedings only when authorized by the President of the Council: before authorization by the Chief Executive, such information can be used by the judiciary only if necessary to prevent or stop the perpetration of a crime.³⁷

The most significant innovation of Law 124/2007 is the creation of a special – but rigidly tailored – functional guarantee to shield intelligence agents from judicial investigation.³⁸ With this legal mechanism, the law has attempted to

34 Introduced by Law 124/2007, Art. 14. For a comment see E Mengoni, 'Art. 14 – L. 3.8.2007 n. 124 – Sistema di informazione per la sicurezza della Repubblica e nuova disciplina del segreto di Stato' [2007] *Legislazione penale* 703.

35 Introduced by Law 124/2007, Art. 15. For a comment see S Campanella, 'Art. 15 – L. 3.8.2007 n. 124 – Sistema di informazione per la sicurezza della Repubblica e nuova disciplina del segreto di Stato' [2007] *Legislazione penale* 707.

36 Law 124/2007, Art. 27

37 *Id.*, Art. 28

38 P Pisa, 'Le garanzie funzionali per gli appartenenti ai servizi segreti. Il commento' [2007] *Diritto penale processuale* 1431.

balance the competing interests at stake. Although the activities of intelligence agencies often take place in the shadow and outside the sphere of the publicity characterizing the activity of public powers, the reform has attempted to design a very precise and well-delimited framework in which the action of the intelligence personnel can be made partially immune from judicial investigation. In other words, while the law recognizes the legitimate goals of the agencies (of gathering and elaborating intelligence also in breach of the law), it has strived to ensure that their unlawful activities be limited to a minimum.³⁹

Accordingly, Art. 17 of Law 124/2007 provides that those officers of the AISE or the AISI who have committed activities which are regarded by the law as *acta rea* cannot be prosecuted if the unlawful acts: a) were committed either in the exercise of or because of the institutional tasks assigned to intelligence agencies, and were specifically authorized by the President of the Council for the purpose of accomplishing a duly documented operation; b) were indispensable for the accomplishment of an operation, proportionate to the end and if no alternative means existed; c) were the result of an appropriate balancing between the private and public interests involved; d) produced only the least possible damage to the private interests that were infringed.⁴⁰ Only if all these conditions occur simultaneously, do courts declare either the inadmissibility of the suit against intelligence officers or their acquittal (save for the possibility of a referral to the Constitutional Court)⁴¹.

To ensure the pre-eminence of the constitutional principles and the absolute inviolability of the fundamental rights of the individual,⁴² however, Law 124/2007 makes clear that the special functional guarantee delineated above does not operate if the *actus reus* committed by the AISE or AISI officer "is a crime threatening or against the life, the physical integrity, the individual personality, the personal liberty, the moral freedom, the health, or the safety of one or more individuals."⁴³ Equally, the functional guarantee does not cover crimes of attacks against the institutions of the State and the regional assemblies, against the political rights of the citizens or crimes against the administration of justice.⁴⁴ No justification exists for the crimes of abduction and subtraction of confidential national security files, terrorism and conspiracy in an organized criminal organization.⁴⁵

By the same token, to ensure the freedom of action of political parties and trade unions as well as the exercise of the freedom of information, Law 124/2007 clearly prohibits *contra legem* activities in the premises of the political parties which are represented in the national Parliament, in a regional assembly or a

39 Cf. in a comparative perspective TF Giupponi, 'Stato di diritto e attività di *intelligence*: gli interrogativi del caso Abu Omar' [2006] Quaderni Costituzionali 810.

40 Law 124/2007, Art. 17(6)

41 See *infra* § IV.C

42 F Marengi, V Caccamo and E Marzaduri, 'Art. 17, 18, 19 – L. 3.8.2007 n. 124 – Sistema di informazione per la sicurezza della Repubblica e nuova disciplina del segreto di Stato' [2007] Legislazione penale 716.

43 Law 124/2007, Art 17(2).

44 *Id.*, Art 17(3).

45 *Id.*, Art 17(4).

regional council, in the premises of trade unions as well as against journalists.⁴⁶ It goes without saying, then, that by virtue of the fundamental constitutional principles of the separation of powers and the autonomy of the constitutional organs, unlawful actions by the intelligence agencies could never be justified if they take place in the premises of the House of Deputies or the Senate – Italy's Parliament; the Presidency of the Republic; the Constitutional Court; the Supreme Council of the Judiciary – i.e. the body that oversees the activity of the judiciary; or of any court or tribunal.⁴⁷

From the procedural point of view, the authorization to commit a criminal act with the possibility to escape criminal sanctions must be expressly allowed by the President of the Council:⁴⁸ only in cases of absolute urgency can the directors of the intelligence agencies authorize such behaviour on their own; and in any event the President of the Council needs to ratify the authorization within 10 days. If the four above-mentioned conditions are not met, the President of the Council cannot authorize an unlawful action: rather, if the Chief Executive is aware of unlawful actions by the intelligence personnel, he must inform the judicial authority. From this point of view, therefore, the provisions of Law 124/2007 confirm the trend, already highlighted above, of consolidating the role of the President of the Council as the authority holding the power and accountability in the field of security intelligence.

In addition, when intelligence agencies intercept communications, a specific authorization also has to be obtained from the Office of the Public Prosecutor, as required by Law 155/2005. In this regard, however, there seem to be several inconsistencies in the legal framework, as Law 124/2007 does not make reference to the need for a judicial authorization with regard to other intelligence activities, even if e.g. the Constitution requires that no search and seizure can occur without a prior judicial warrant.⁴⁹ Whether the intervention of the judiciary would be possible in a situation where intelligence officers are actually authorized by the Chief Executive to act in violation of the criminal code is nonetheless debatable. The possibility of instituting a kind of 'national security court'⁵⁰ – an *ad hoc* and independent judicial body capable of reviewing the compatibility between the authorized criminal behaviours and the law – has been proposed by some as an option, but there is still disagreement among scholars on this issue.⁵¹

In conclusion, by instituting a functional guarantee for the agents of the secret services who have committed unlawful actions under the explicit

46 Id., Art 17(5).

47 P Bonetti, 'Profili costituzionali delle garanzie funzionali per gli agenti dei Servizi di informazione per la sicurezza' [2008] *Percorsi costituzionali* 45.

48 Law 124/2007, Art. 18. Cf. R Bricchetti and L Pistorelli, 'Il Premier autorizza condotte criminose' [2007] 40 *Guida al diritto* 65.

49 See Giupponi (n 1) 24.

50 For an assessment of the functioning of the national security courts in the US system and for a proposal to create one to supervise detention of suspected terrorists see J Goldsmith, 'Long-Term Detention and a US National Security Court', in B Wittes (ed.), *Legislating the War on Terror: An Agenda for Reform* (Brookings Institution P, Washington DC, 2009) 75. For a reasoned critique of such a claim see however S Matheson, *Presidential Constitutionalism in Perilous Times* (Harvard UP, Cambridge, 2009) 157.

51 See Giupponi (n 39) 812.

authorization of the President of the Council, if they were indispensable and proportionate to the achievement of the institutional tasks of the agencies, Law 124/2007 ensures the effectiveness of the intelligence. On the other hand, by specifying types of criminal behaviour which can never be authorized *ex ante* and justified *ex post*, the law guarantees the protection of the inviolable fundamental rights of men and the core institutional principles that govern the State. The attempt by the legislature to strike the right balance between the competing interests should overall be positively appreciated.

It seems, nonetheless, that alternative venues were available and could have perhaps been considered by Parliament in reforming Law 801/1977. Hence, among others, scholars have emphasized – from a comparative perspective – that, rather than specifying the criminal behaviors of intelligence officers that can never be authorized and can never benefit from the functional guarantees before a court of law, the Law could have determined *a priori* those unlawful actions (and *only* those actions) that could be authorized by the Chief Executive.⁵² Equally, the possibility of introducing several forms of prior judicial oversight of the conformity of the specially authorized operations with the law could have been taken into account.⁵³ On account of these, while Law 124/2007 represents a step forward, additional reforms on the relationship between the intelligence personnel and the judiciary could prove necessary in the future.

IV. THE OVERSIGHT MECHANISMS OF THE INTELLIGENCE AGENCIES

Law 124/2007, with the purpose of rationalizing the operations of the AISI and the AISE, has set up an innovative legal framework to oversee the activities of intelligence agencies.⁵⁴ In the context of a broader re-organization of the administrative and institutional structure of the intelligence agencies, the reform has introduced three sets of oversight mechanisms on the activities of the secret services: A) internal administrative review; B) external political review; and C) external judicial review. Specific attention is then given by the law to the mechanism of financial and budgetary control. By introducing a plurality of instruments to check the activity of the intelligence agencies, the Law has acknowledged that a single oversight mechanism is insufficient in itself to restrain the security services and that only the existence of different institutional constraints can ensure that intelligence agencies do not violate the rule of law.⁵⁵

52 For support see P Pisa, 'Servizi segreti e Stato di diritto' [2001] Diritto penale processuale 1457.

53 For support see Bonetti (n 6).

54 Cf. in general S Gambacurta, 'Il sistema dei controlli', in C Mosca, S Gambacurta, G Scandone and M Valentini (eds.), *I servizi di informazione e il segreto di Stato* (Giuffr , Milano, 2008) 343.

55 A similar conclusion is defended in the Report submitted to the Human Rights Council by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism M Scheinin, 'The Role of Intelligence Agencies and their Oversight in the Fight Against Terrorism', A/HRC/10/3 of 4 February 2009. On the same vein the Special Rapporteur has recently submitted also a 'Compilation of Good Practice on Legal and Institutional Frameworks and Measures that Ensure Respect for Human Rights by Intelligence Agencies While Countering Terrorism, Including on their Oversight', A/HRC/14/46 of 5 May 2010.

A. Internal administrative review

To ensure the continuous internal review of the activities of the intelligence agencies, Art. 4 of Law 124/2007 has introduced within DIS a special Office of the Inspector General, which is entrusted with the duty "to control the AISI and the AISE, to verify the conformity of the intelligence activity undertaken by the agencies with the relevant laws and regulations"⁵⁶ and to set up special investigations on professional misconducts and unlawful behaviours. The Office is endowed with a certain degree of autonomy from the administrative structure of the DIS in order to ensure the independence and the freedom of action of the staff of the Inspector General. Nevertheless, many important competences of the Office of the Inspector General cannot be exercised absent prior authorization of the President of the Council: and this significantly weakens the power of the Office to operate as an effective check on the activity of the intelligence services.

Hence, authorization by the President of the Council, for example, is required for the Office of the Inspector General to open a formal internal investigation, to access the confidential databases of the agencies and to request information and documents from other administrative bodies outside the intelligence apparatus. In addition, according to the law, the review by the Office of the Inspector General must never interfere with ongoing intelligence operations. These provisions clearly weaken the role of the Office of the Inspector General. The Office, however, has a general power to oversee the cost of special operations, hence putting some internal pressure on the work of the intelligence agencies. From the financial point of view, then, the review of the conformity of the budget of the intelligence agencies is assigned to a special division of the Court of Auditors, set up within the DIS.⁵⁷

B. External political review

At the political level, a central role in the oversight of intelligence agencies has been attributed by Law 124/2007 to a special and newly established Parliamentary Committee on the Security of the Republic (COPASIR). The COPASIR replaces the Parliamentary Control Committee (COPACO) which had been instituted by Law 801/1977. The COPASIR is composed of five members of the House of Deputies and of five members of the Senate – i.e. Italy's two chambers of Parliament – nominated by the Presidents of the two branches of the legislature. The COPASIR ensures the equal representation of both the members of the majority party or coalition parties in Parliament and of the opposition. To guarantee a meaningful involvement of the minority party and an effective check on the activity of the Government, the law requires that the President of the COPASIR be chosen among the members of the opposition.⁵⁸

The institutional task of the COPASIR is to verify "systematically and continuously that the activities of the intelligence agencies comply with the

⁵⁶ Law 124/2007, Art. 4(3)(i).

⁵⁷ Law 124/2007, Art. 29(3)(c).

⁵⁸ *Id.*, Art. 30.

Constitution and the rule of law, in the exclusive interest of the defence of the Republic and its institutions."⁵⁹ To this end, the Law entrusts to the COPASIR a review function and an advisory function, and makes it the addressee of several mandatory communications by the Government.⁶⁰ The COPASIR exercises its supervision by organizing hearings, requesting documents, accessing premises and controlling the intelligence budget. The summoning of intelligence officers to testify in front of the COPASIR requires, however, the prior consent of the President of the Council, who can oppose the request for justified reasons. By the same token, the attainment by the COPASIR of documents in possession of the judicial authority is possible, except for reasons relating to the secrecy of investigations.⁶¹

The COPASIR can request documents directly from the intelligence agencies and is legally entitled to receive a copy. Nevertheless, DIS can oppose such a request, if it could "jeopardize the security of the Republic, the relationship with foreign States, the course of ongoing operation or the security of sources of information and agents of the secret services."⁶² If the COPASIR insists on the disclosure of these documents by deeming the refusal of DIS unjustified, though, a special decision has to be taken by the President of the Council, who can resort to the State secret privilege. Art. 31(9) of Law 124/2007, then, makes it clear that no refusal to disclose documents can be made to the COPASIR when the latter is investigating institutional misconduct by intelligence officers.

Besides its oversight function, the COPASIR also plays an advisory role⁶³: it needs to be consulted before the adoption by the President of the Council of regulations concerning the organization of the intelligence apparatus and the legal status of the personnel. In addition, the Law requires the COPASIR to present an annual report to Parliament "to give information about the activities that were carried out and to formulate proposals on the issue of its competence."⁶⁴ The COPASIR must, however, at all times inform the Presidents of the two chambers of Parliament if, in its oversight function, it identifies any irregularities by the intelligence agencies.⁶⁵

On the basis of Art. 33 of Law 124/2007, moreover, the COPASIR must be informed within 30 days of any special operation by the intelligence services in which the authorization to commit an unlawful act has been granted. This duty of information to the benefit of the COPASIR is particularly relevant, as it puts the Parliamentary control body in a position to evaluate and review the circumstances of the special operations and their lawfulness in light of the existing legislation.⁶⁶

59 *Id.*, Art. 30(2).

60 Gambacurta (n 50) 371.

61 Law 124/2007, Art. 31 For a comment see G Campanelli and E Mengoni, 'Art. 31- L. 3.8.2007 n. 124 – Sistema di informazione per la sicurezza della Repubblica e nuova disciplina del segreto di Stato' [2007] *Legislazione penale* 789.

62 Law 124/2007, Art. 31(8).

63 *Id.*, Art. 32.

64 *Id.*, Art. 35.

65 *Id.*, Art. 34.

66 Cfr. G Campanelli, 'Art. 33 – L. 3.8.2007 n. 124 – Sistema di informazione per la sicurezza della Repubblica e nuova disciplina del segreto di Stato' [2007] *Legislazione penale* 800.

Every six months, then, the President of the Council has to submit to the COPASIR a report on the activities of the intelligence agencies, including a strategic assessment of the threats to national security and the responses planned. The general budget of DIS must also be submitted annually to the COPASIR to keep it informed on the financial management of the agencies.

Overall, the recent legal reform has gone in the direction of strengthening the role of Parliament (and of the opposition in Parliament) in the oversight of the activities of the intelligence agencies. It seems, however, that a number of shortcomings still persist even under the new legal framework, and that these gaps diminish the capacity of the COPASIR to function as a real countercheck of the intelligence apparatus. In particular, the COPASIR is always involved *a posteriori*, i.e. once the secret services have already acted.⁶⁷ As such, the COPASIR cannot prevent any potential unwarranted actions by the intelligence agencies before they take place. From this point of view, the oversight role of the COPASIR is rather political – following a 'traditional' logic of Parliamentary control of the action of the Executive power.

C. External judicial review

Like the activity of all public authorities, also that of the intelligence agencies is subject to external judicial review.⁶⁸ In general terms, therefore, *ex post* oversight on the action of the secret services consists of the instruments of the ordinary criminal judicial system. We have already seen in the previous section that Law 124/2007 has instituted a special functional guarantee for the intelligence officers only under a limited number of conditions: criminal behaviour of intelligence agents in the exercise of their institutional functions – if the conduct was expressly authorized by the President of the Council and did not violate the principles of proportionality and of the least restrictive means – is not subject to criminal sanctions. Beyond this, intelligence agents are responsible for their criminal behaviour.

In addition, to avoid potential distortions of the above-mentioned functional guarantees and to make sure that the legal safeguard set up by the law does not become a pretext to avoid any judicial review on the activity of the intelligence agencies, Law 124/2007 accords a major role to the Constitutional Court. According to Art. 134 of the Italian Constitution, in fact, the Constitutional Court shall umpire the "conflicts of attribution between branches of government" that arise both, when an institution asserts that its competence has been unlawfully exercised by another branch or when an institution asserts that another branch has wrongly exercised the competence with which it was rightly endowed.⁶⁹ For this reason, the recent reform charged the Constitutional Court with the duty to

67 Bonetti (n 6) 293.

68 Cf. in a comparative perspective F Fabbrini, 'Lotta al terrorismo e tutela dei diritti fondamentali: la *Rivista Italiana di Intelligence*' [2010] *Rivista Trimestrale di Diritto Pubblico* 328.

69 On the function of the Constitutional Court in resolving conflict of attributions cf. A Barbera and C Fusaro, *Corso di diritto pubblico* (Il Mulino, Bologna, 2008, 5th ed.) 401. See also T Groppi 'The Constitutional Court of Italy: Towards a Multilevel System of Constitutional Review?' (2008) 3 *Journal of Comparative Law* 100.

resolve all the controversies regarding the sphere of application of the functional guarantees protecting the intelligence personnel.

When, in the course of a criminal investigation or during the hearings of a criminal trial, an intelligence agent invokes his functional guarantee to escape prosecution or conviction – and when the President of the Council confirms through a written and motivated statement the applicability of the functional guarantee – the Office of the Public Prosecutor or the competent Court can – if they believe that the decision of the President of the Council is unwarranted – refer the matter to the Constitutional Court.⁷⁰ The latter is hence called on to rule on a conflict of attribution between the judicial authority and the executive branch and has to decide whether the decision of the President of the Council to confirm the use of the functional guarantees' immunity has infringed the constitutional prerogatives of the judiciary.

By channelling before the Constitutional Court the litigation on the concrete application of the functional guarantees set up by the law to protect several specific activities carried out by intelligence officers, Law 124/2007 has attempted, once again, to balance the conflicting interests of national security and the rule of law.⁷¹ Because of its institutional role, indeed, the Constitutional Court seems in the best position to guarantee that neither the activity of the judiciary nor the activity of the intelligence agencies are unreasonably restricted. At the same time, however, the recent legal reform has opened up new questions concerning the role of the Constitutional Court: is the Court only competent to ensure that the procedural steps mandated by the law (assuming the law is constitutional) have been complied with or is it endowed with the power to review on the merits the decisions of the Chief Executive?

Given that the choice to authorize intelligence agents to commit criminal behaviour for the purpose of national security is clearly entrusted, because of its political nature, to the President of the Council, it would seem that the Constitutional Court would only be able to scrutinize whether the executive has complied with the procedural conditions set by the relevant legislation for authorizing the agents of the intelligence service to act illegally. At the same time, nonetheless, by being able to review the proportionality of the measures and their indispensability (i.e. the absence of other less restrictive means), the Constitutional Court could end up reviewing the political merit of the decision, partially overstepping the functions of the President of the Council (as well as of the COPASIR). *De facto*, in the end, only the legal practice will tell which role will the Constitutional Court be willing to exercise.

70 Law 124/2007, Art. 19.

71 On the balancing function of the Constitutional Court see A Morrone, 'Bilanciamento (Giustizia Costituzionale)', *Enciclopedia del Diritto*, Ann. II.2 (Giuffrè, Milano, 2008) 185. For a reasoned critique of the risks inherent in the balancing exercise in the field of national security see however M Scheinin, 'Terrorism and the Pull of "Balancing" in the Name of Security', in M. Scheinin (ed.), *Law and Security – Facing the Dilemma* (EUI Working Paper Law No. 11, Florence, 2009) 55.

V. THE LEGAL REGIME OF THE STATE SECRET PRIVILEGE AND OF THE OTHER 'CONFIDENTIAL INFORMATION'

Law 124/2007 has also reformed the legal framework of the State secret privilege.⁷² From an institutional view point, the law has maintained the central role of the President of the Council.⁷³ The Chief Executive is in fact the only person empowered to order the classification of a piece of information as a State secret and to assert the privilege against other institutions. Under the new legal framework, however, the DIS is competent to ensure the enforcement of the orders of the President of the Council and to guarantee, at the administrative level, the handling of State secrets. To this end, a special division – the Central Secrecy Office (UCSE) – has been set up within the DIS.⁷⁴ The UCSE has both advisory and control functions, it coordinates the intelligence databases and classifies secret information; in addition, it grants (and revokes) special 'security clearances' by which individuals are authorized to access classified information.

Law 124/2007 has in fact introduced a clearer distinction between information that is subject to a State secret *stricto sensu* and 'confidential information' – requiring *tout court* the secrecy of the former while allowing, albeit within limits, the disclosure of the latter.⁷⁵ According to Art. 39, 'secret information' *stricto sensu* consists in "the documents, the acts, the activities, the things, the places covered by the State secret" knowledge or circulation of which can damage "the integrity of the Republic, even in relation with international agreements, the defence of the institutions established by the Constitution, the independence of the State *vis à vis* other States and in its relationship with them and the preparation and military defence of the State."⁷⁶ Only those authorities entrusted with specific institutional functions relating to the secret information *de quibus* can be given knowledge about them.⁷⁷

A Prime Ministerial decree of 2008⁷⁸ further specified the types of information that can be classified as 'secret information'. Among the examples listed in the regulation are information relating to the protection of popular sovereignty and the economic interest of the State; information identifying the location of the military bases; and information concerning plans of subversion. Moreover, the decree includes in the possible area of application of the State secret privilege all information on the structure, the organization, the competencies and the activities of the DIS and the intelligence agencies, including their relationships

72 Cf. in general A Morrone, 'Il *nomos* del segreto di Stato, tra politica e Costituzione', [2008] Forum Quaderni Costituzionali <http://www.forumcostituzionale.it/site/images/stories/pdf/documenti_forum/paper/0164_morrone.pdf> last accessed 2 June 2010; G Scandone, 'Il segreto di Stato nella legge di riforma', in C Mosca, S Gambacurta, G Scandone and M Valentini (eds.), *I servizi di informazione e il segreto di Stato* (Giuffrè, Milano, 2008) 481.

73 G Salerno, 'Il segreto di Stato tra conferme e novità' [2008] Percorsi costituzionali 66.

74 Law 124/2007, Art. 9.

75 S Gambacurta, 'I controlli, il segreto di Stato e le classifiche di segretezza', in C Mosca, S Gambacurta, G Scandone and M Valentini (eds.), *I servizi di informazione e il segreto di Stato* (Giuffrè, Milano, 2008) 735-737.

76 Law 124/2007, Art. 39(1).

77 Id., Art. 39(2).

78 Decree of the President of the Council of 8 April 2008.

with foreign services. Despite the attempt by the legislation to adopt a more analytical approach to the information that can be protected by the State secret privilege, therefore, it seems that the range of information that is potentially 'secret' remains wide.⁷⁹

With regard to 'confidential information', instead, Law 124/2007 singles out four categories of information that are subject to different disclosure policies:⁸⁰ depending on its content, information can be 'top-secret', 'secret', 'top-privy' and 'privy'.⁸¹ The classification is set up directly by the intelligence, on the basis of the risk deriving from the potential spread of the information. Contrary to 'secret information' *stricto sensu*, 'confidential information' can be disclosed to those people who have a need to access it for institutional purposes. A special 'security clearance' needs to be granted by the UCSE for this purpose (except to access to the 'privy information'); the security clearance, though, has a different validity depending on the type of information the access of which is requested: it lasts ten years with regard to 'top-privy' or 'secret' information, but only five years for 'top-secret' information.⁸²

Although the Constitutional Court has acknowledged in its judgment n. 295/2002 that the interests protected by both, 'secret information' and 'confidential information' are homogenous and largely overlapping,⁸³ the distinction between the two introduced by Law 124/2007 has important consequences. To begin with, from the operational point of view, information can be classified as State secret *stricto sensu* only by the President of the Council.⁸⁴ Vice-versa, 'confidential information' is directly classified (in one of the four above-mentioned categories) by the authority which has drafted the document, attained the information and is responsible for it.⁸⁵ The President of the Council, with the support of the DIS and the UCSE, only oversees the general respect for the applicable laws and regulations.

In addition, 'secret information' *stricto sensu* and 'confidential information' differ with regard to the length of the duration of its classification as such. The classification as State secret ordinarily lasts for 15 years, but the President of the Council can renew it for another 15 years.⁸⁶ After a maximum of 30 years, "all those who have an interest can request the President of the Council to grant access to the information, the documents, the acts, the activities, the objects and the places which are covered by the State secret."⁸⁷ At any time, however,

79 Cf. critically Pace (n 22) 4042.

80 Cf. G Salvi, 'Confermate le classifiche di riservatezza' [2007] 40 Guida al diritto 77.

81 Law 124/2007, Art. 42. G Campanelli and F. Alemi, 'Art. 42 – L. 3.8.2007 n. 124 – Sistema di informazione per la sicurezza della Repubblica e nuova disciplina del segreto di Stato' [2007] Legislazione penale 855.

82 Law 124/2007, Art. 9(3).

83 Cf. for a commentary on the decision P Pisa and L Scopinaro, 'Segreto di Stato e notizie riservate: un'interpretazione costituzionalmente corretta in attesa della riforma del codice penale' [2002] Giurisprudenza costituzionale 2130.

84 Law 124/2007, Art. 39(4). Cf. Salerno (n 73) 66.

85 Law 124/2007, Art. 42(4).

86 Cf. Bonetti (n 6) 289.

87 Law 124/2007, Art. 39(7). See also S Gambacurta, 'Il diritto di accesso', in C Mosca, S Gambacurta, G Scandone and M Valentini (eds.), *I servizi di informazione e il segreto di Stato* (Giuffrè, Milano, 2008) 698.

the President of the Council can withdraw the secrecy and declassify all the information – except when this concerns foreign agents; in such case a special agreement with the foreign authorities is required.⁸⁸ On the contrary, 'confidential information' remains classified for a maximum of ten years and after five years they are automatically downgraded to a lower level of 'secrecy' (e.g. from 'top-secret' to 'secret'), except when the President of the Council provides otherwise with a motivated act.⁸⁹

In sum, by establishing a different legal discipline for 'secret information' and 'confidential information', Law 124/2007 has attempted to vary the degree of protection on the basis of the qualitative relevance of the information. Whereas the State secret *stricto sensu* protects 'the supreme and essential interests of the State', connected to the integrity of the Republic, the defence of the institutions established by the Constitution, the independence of the State *vis à vis* other States and in its relationship with them and the military capacity of the State, 'confidential information' is directed at safeguarding those 'fundamental interests of the Republic', for which the intelligence agencies deem appropriate such form of classification and access restricted only to those persons institutionally involved or 'cleared' by the UCSE.

VI. THE STATE SECRET PRIVILEGE AND THE RULE OF LAW: THE RELATIONSHIP BETWEEN THE JUDICIARY AND THE PRESIDENT OF THE COUNCIL

In reforming the legal framework of the State secret privilege, Law 124/2007 has attempted to strike a more reasonable balance between the needs of national security and the rule of law than that of the previous legal regime.⁹⁰ The rules on the State secret privilege contained in Law 801/1977 were indeed mostly ambiguous and *de facto* integrated by several 'hidden' executive regulations. As mentioned in the previous section, on the contrary, within the current legal regime the Law clearly defines what information can be classified as State secrets and expressly identifies in the President of the Council the only authority who can order the classification of a piece of information as a 'State secret' *stricto sensu*. With this choice Law 124/2007 has strengthened – also with regard to the State secret – the position of the President of the Council, but it has also clearly identified the accountable authority.⁹¹

Although the DIS and the intelligence agencies can advise the President of the Council, the decision to classify a piece of information as a State secret is an autonomous political choice of the Chief Executive, the effect of which is the beginning of the 15-year period in which the information remains totally inaccessible. It has to be borne in mind, nonetheless, that according to Art. 202

88 Law 124/2007, Art. 39(10). Cf. G Salvi, 'Durata massima di quindici anni' [2007] 40 Guida al diritto 75-76.

89 Law 124/2007, Art. 42(5).

90 Cf. A Natalini, 'Arcana imperii e tutela penale del segreto di Stato: le "nuove" frontiere del sindacato di legittimità sugli atti di apposizione' [2003] Giurisprudenza italiana 1229.

91 Giupponi (n 1) 38.

CCP⁹² the President of the Council can also decide to seal the secrecy of a piece of information, when access to the latter is requested by a judicial authority – and in this case, the *dies a quo* for the 15-years validity of the secrecy is regarded as starting from the very day in which the Chief Executive has asserted the privilege not to disclose the information. To avoid any arbitrary use of this executive power, however, Law 124/2007 has established several legal checks regulating the relationship between the executive and the judiciary.⁹³

In particular, when in the course of a criminal investigation the accused person or any other party to the lawsuit invokes the State secret privilege, the judiciary (including the Office of the Public Prosecutor) can raise a formal 'appeal' to the President of the Council, asking him to confirm or deny the existence of a State secret over the requested information.⁹⁴ If within 30 days the President of the Council does not reply, the judicial authority can attain all the information as regular evidence.⁹⁵ If, instead, the President of the Council confirms the existence of a State secret classifying the requested information, the judge of the proceedings shall either dismiss the lawsuit or continue it without considering as valid evidence the information protected by the State secret.⁹⁶ Nonetheless, if the judicial authority is not convinced by the decision of the Chief Executive, it can start proceedings for a conflict of allocation of powers before the Constitutional Court.

Otherwise, in addition to these procedural guarantees against potential abuses of the State secret by the executive power, Art. 39(11) of Law 124/2007 also sets out several substantive guarantees aimed at forbidding the invocation of the State secret privilege in some sensitive criminal investigations. Hence, no State secret can be asserted by the President of the Council to prevent a judicial investigation concerning acts of terrorism, attacks to the constitutional order and the crimes of havoc and conspiracy in mafia organizations. Equally, on the basis of Art. 204(1bis) CCP⁹⁷ no State secret privilege can be invoked to hamper investigations on unlawful conduct by intelligence officers carried out in violation of the *ad hoc* rules establishing and limiting the room of application of the functional guarantees. Thanks to these provisions, Law 124/2007 ensures that the State secret privilege will not be used to jeopardize those constitutional interests for the protection of which it has been created.

As a consequence, whenever in the midst of a criminal investigation the judicial authority encounters *acta reae* which fall into the above-mentioned list of criminal conducts for which no State secret can be opposed, it can disregard the classification sealed by the President of the Council and attain all the information as evidence for the trial. The judicial authority must however notify its decision to the Chief Executive, who can, in reaction, bring a conflict of attribution before the Constitutional Court. In the end, therefore, the Constitutional Court can

92 As modified by Law 124/2007, Art 40(1). For a critical view see G Salvi, 'Dubbi sull'opposizione del segreto' [2007] 40 Guida al diritto 83.

93 C Bonzano, 'La nuova tutela penale del segreto di Stato: profili sostanziali e processuali' [2008] Diritto penale processuale 26.

94 Law 124/2007, Art. 41(2).

95 Id., Art. 41(4).

96 Id., Art. 41(5) and Art. 41(6).

97 Introduced by Id., Art. 40(3).

always be called upon to decide on the application of the State secret privilege, with the duty to strike the appropriate balance between the conflicting requests of the executive and the judiciary.

As provided by Art. 41(7) of Law 124/2007, "when the Constitutional Court resolves the conflicts of attribution by denying the admissibility of the assertion of the State secret, the President of the Council cannot invoke it anymore against the judiciary; when, on the contrary, the Constitutional Court resolves the conflicts of attribution by recognizing the admissibility of the assertion of the State secret, the judicial authority cannot attain and make use, either directly or indirectly, of the acts and documents sealed by a State secret". As such, the recent legal reform has attempted to balance the conflicting interests at stake by making the Constitutional Court the final arbiter of the inevitable tensions raising between the judiciary (which pursues its institutional task of prosecuting crimes) and the executive (which has a constitutional duty to ensure national security).⁹⁸

On the other hand, as highlighted in Section IV, the task entrusted to the Constitutional Court is not always easy and could lead the Court down a slippery path. The Constitutional Court seems to be aware of this challenge, and, as a consequence, has, in general, adopted a cautious stand – acknowledging that the decision to classify information as a State secret is the expression of a largely discretionary power of the executive aiming at the protection of the supreme interests of the State. Equally, in its ruling n. 110/1998 (when, of course, Law 124/2007 was not yet in force) the Court has clarified that its judicial scrutiny will not extend to a review on the merits of the balancing choices made by the political branches. Rather, under the legal regime of Law 801/1977, the Court has emphasized that Parliament should have a greater role in the oversight of the assertion of the State Secret privilege.⁹⁹

Taking seriously this invitation, Law 124/2007 has strengthened the political review mechanism by increasing the involvement of the COPASIR in this field. The COPASIR must in fact be informed by the President of the Council of any decision to classify a piece of information as a State secret (or to renew this classification after 15 years) as well as of any decision to invoke the State secret privilege against a judicial request for the disclosure of information. If the COPASIR considers the decision unwarranted, it can submit a report to the Chambers of Parliament, thereby giving rise to a political debate on the legitimacy of the measure. Breaking with the previous legal regime, then, Law 124/2007 denies any possibility of invoking a State secret privilege against an investigation by the COPASIR, when there is an unanimous request to be granted access to the information.¹⁰⁰

Nevertheless, the political oversight mechanisms of the concrete application of the State secret privilege still remain weaker than the judicial ones. *De facto*,

98 Cf. N Triggiani, 'Art. 40 – L. 3.8.2007 n. 124 – Sistema di informazione per la sicurezza della Repubblica e nuova disciplina del segreto di Stato' [2007] *Legislazione penale* 840-841; G Salvi, 'Alla Consulta il ruolo di ultimo garante' [2007] 40 *Guida al diritto* 85.

99 On the role of Parliament in overseeing the application of the State secret privilege see R Borrello, *Segreti pubblici e poteri giudiziari delle commissioni d'inchiesta: profili costituzionalistici* (Giuffrè, Milano, 2003).

100 Law 124/2007, Art. 31(9).

by specifying the objective interests that can legitimize the privilege of the State secret; by clarifying the authorities, the procedures, the responsibilities and the limits of the employment of the State secret privilege, as well as by stating that the State secret privilege can never be utilized to prevent the Constitutional Court from acquiring all the information it requests,¹⁰¹ Law 124/2007 has made the Constitutional Court the leading oversight institution. All these factors push the Court to operate as a true judge of the lawfulness of the employment of the State secret privilege and not just as an external auditor of the respect for the procedures provided by the law. As the Abu Omar case demonstrates, however, the Constitutional Court has not proved itself as being up to the challenge yet.

VII. THE ABU OMAR CASE: A BRIEF OVERVIEW

The Abu Omar judicial saga¹⁰² began in 2005, when the Office of the Public Prosecutor of Milan, led by Mr. Armando Spataro, opened a formal criminal investigation on the secret abduction in Milan and the extraordinary rendition¹⁰³ to Egypt of a radical imam, Mr. Osama Mustafa Hassan Nasr (*alias* Abu Omar), by agents of the Italian intelligence in cooperation with CIA personnel in Italy. In the course of the criminal investigation, the defendants, Mr. Nicolò Pollari and Marco Mancini – both officers of the SISMI, invoked a State secret privilege concerning the organization of the secret services and the relationship of the Italian agencies with foreign agencies, but not the extraordinary rendition of Mr. Abu Omar himself. The existence of a State secret privilege was confirmed (though with some delay) by the President of the Council Romano Prodi and later also by Silvio Berlusconi.

The decision of the Chief Executive to deny access to all information on the organization of the intelligence and on its relationship with the CIA generated a

101 *Id.*, Art. 41(8).

102 On the *Abu Omar* case cf. in addition to the literature cited supra in nt 3 J Foot, 'The Rendition of Abu Omar' [2007] 15 *The London Rev of Books* 24; F Messineo, ' "Extraordinary Renditions" and State Obligations to Criminalize and Prosecute Torture in the Light of the Abu Omar Case in Italy' [2009] 7 *J Intl Crim Justice* 1023.

103 For a description of the practice of extraordinary renditions in the war on terror and for its critique see M Satterthwaite, 'Rendered Meaningless: Extraordinary Rendition and the Rule of Law' [2006] 75 *Geo Wash L Rev* 1333. The practice of extraordinary rendition has recently come under fire by different international institutions. Cf. the Concluding Observations of the Human Rights Committee established under the International Covenant on Civil and Political Rights, 'Report on the USA', CCPR/C/USA/CO/3/Rev.1 of 18 December 2006; the Final Report of the European Parliament, 'Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners', Eur. Parl. Doc. A6-0020/2007 of 30 January 2007; and the two Reports written by Dick Marty for the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, 'Alleged Secret Detentions in Council of Europe Member States', AS/Jur (2006) 03 of 22 January 2006 and 'Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member States', AS/Jur (2007) 36 of 7 June 2007. For a comment to the reports of the Parliamentary Assembly of the Council of Europe cf. also M Hakimi, 'The Council of Europe Addresses CIA Rendition and Detention Program' (2006) 101 *AJIL* 442.

cluster of litigations before the Constitutional Court.¹⁰⁴ Both the judge of the proceedings in Milan and the Office of the Public Prosecutor, in fact, brought a conflict of attribution against the Government, asserting the infringement of their constitutional prerogatives. The President of the Council, in its turn, started proceedings against the Office of the Public Prosecutor and the judge in Milan for making use of information subject to the State secret privilege in the criminal trial. All the conflicts of attribution were considered *prima facie* as admissible by the Constitutional Court which, after uniting the proceedings, moved to the decision on the merits in February 2009.

The judgment of the Court, n. 106/2009, began with a detailed explanation of the facts of the case and with a long reassessment of the precedents of the Court in the field of State secrecy. The Court restated its view that the judiciary can "not scrutinize the 'an' [if] or the 'quomodo' [how] of the decision of the executive to seal an information as a State secret, because the choice on the necessary and appropriate means to ensure national security is a political one – belonging as such to the executive branch and not to the ordinary judiciary". At the same time, however, the Court reaffirmed with confidence its role "in the case of a conflict of attribution between powers of the State". The language adopted seemed, therefore, to imply a full and unrestrained power of the Constitutional Court to scrutinize the action of the executive.

In the leading part of the decision, however, the Constitutional Court refused to review the reasons brought forward by the government to seal as State secret the information requested by the ordinary judiciary. In the words of the Constitutional Court, in fact, "the judgment on what means are considered as most appropriate or simply useful to ensure the security of the State belongs to the President of the Council under the control of Parliament". In the opinion of the Court, in fact, any such decision would result in a "judgment on the merit of the choice to dispose the State secret": and this would not be consistent with the role of the Constitutional Court. According to the Court, Law 124/2007 had entrusted a specific duty to review the proportionality of the decision taken by the Government to the COPASIR, the duty of which was to perform a political review of the intelligence apparatus.

On the basis of this reasoning the Court reached the conclusion that the Government could not be blamed for any unlawful behaviour and that, as a consequence, the claims of the court and the Office of the Public Prosecutor of Milan had to be rejected. After the decision of the Constitutional Court, the criminal trial restarted in Milan: the Prosecutors and the judge, Oscar Magi, however, did not have the possibility to use the information regarded by the executive branch as a State secret. The trial eventually lead to the sentencing of 26 CIA agents for the crime of abduction and the extraordinary rendition of Mr. Abu Omar. Because of the operation of the State secret privilege, however, the officers of the Italian agencies were all acquitted as the evidence against them could not be utilized by the court.

104 Giupponi (n 3) 384; M Perini, 'Segreto di Stato, avanti con leggerezza: due ordinanze, quattro ricorsi e un probabile assente, il conflitto fra poteri' [2007] *Giurisprudenza costituzionale* 2311.

The outcome of the Abu Omar judicial saga has been regarded as positive by some scholars, who have seen in the investigation of a crime of extraordinary rendition and in the decision by a court of law to condemn the responsible persons for the grave violations of human rights they had committed an important victory of the rule of law over the need of national security.¹⁰⁵ This view is largely to be shared, since overall the Abu Omar judicial saga marks a step forward in the re-establishment of the rule of law even in the age of terrorism. Nonetheless the fact that the final outcome of the criminal trial in Milan led to the condemnation only of US foreign agents (who the US has already made clear it will not extradite)¹⁰⁶, with the acquittal instead of all the Italian intelligence officers involved in the operation, has also given rise to some legitimate criticism.¹⁰⁷

In particular, the decision of the Constitutional Court does not seem entirely satisfactory. As has been convincingly argued, the Court itself had made clear since the beginning of its judgment that its role extended to the evaluation of the conditions justifying the State secret privilege. Logically, however, such an evaluation cannot be limited to a procedural review and should include a deeper scrutiny of the legitimacy on the merits of the decision to classify a piece of information as a State secret.¹⁰⁸ For the Court, it is therefore rather inconsistent with its own premises to conclude, in the dispositive part of its judgment, that it will only limit itself to a sort of external review of compatibility of the decision of the Chief Executive with the procedures set by the law and that it will not dwell on the reasons that justified the decision taken by the President of the Council.

Although, for sure, the Constitutional Court should not be entitled to challenge the political decision of the Government, still, by giving up the power to review the reasons advanced by the executive to classify a piece of information as a State secret the Court *de facto* risks reducing the conflict of attribution to a meaningless oversight mechanism. This also seems to contrast with the original intent of Law 124/2007 which – *inter alia* by denying the possibility for the Government to invoke a State secret privilege before the Constitutional Court – was inspired by the will to make the Court aware of all the evidence necessary to make a reasoned and informed decision on the merits. In light of this, in the Abu Omar case, the Constitutional Court, by adopting a minimalist approach,¹⁰⁹ has not exercised an appropriate balancing test of the different constitutional interests at stake.

In the end, by bowing to the autonomous evaluation of the Government and of Parliament and by restricting its review to an external oversight of the respect

105 See e.g. D Cole, 'Getting Away With Torture' [2010] 1 The New York Rev of Books 39.

106 Cf. on this problem P Gaeta, '*Extraordinary renditions* e immunità dalla giurisdizione penale degli agenti di Stati esteri: il caso *Abu Omar*' [2006] Rivista di Diritto Internazionale 126.

107 F Ramacci, 'Segreto di Stato, *salus rei publicae* e "sbarramento" ai p.m.' [2009] Giurisprudenza costituzionale 1015; G Salvi, 'La Corte e il segreto di Stato'[2009] Cassazione Penale 3729.

108 A Anzon, 'Il segreto di Stato ancora una volta tra Presidente del Consiglio, autorità giudiziaria e Corte costituzionale' [2009] Giurisprudenza costituzionale 1020.

109 On the idea of judicial minimalism cf. C Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Harvard UP, Cambridge, 2001). For a critique of the practice of judicial self-restraint in counter-terrorism issues cf. however the position defended by F de Londras in F de Londras and F Davis, 'Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanisms' [2010] 30 OJLS 19.

for the procedures provided by the law, the Constitutional Court has embraced a sort of political question doctrine.¹¹⁰ Under a similar doctrine, however, the needs of national security would always trump the objective to guarantee respect for the rule of law through the activity of the courts. It seems therefore that the innovative provisions of Law 124/2007, instituting the conflict of attribution as a mechanism to restrain the executive power in the area of the State secret privilege, are weakened by the *Abu Omar* jurisprudence – as no substantive review of the decision of the Government will be taken by the Constitutional Court.

From this point of view, the *Abu Omar* judicial saga and the unsatisfactory decision of the Constitutional Court, highlight how difficult it is to design institutional mechanisms for the oversight of the activities of intelligence agencies and of the employment of the State secret privilege. Despite having been recently overhauled, the Italian legal framework already displays gaps which could be exploited by the intelligence agencies to escape accountability. At the same time, however, Law 124/2007 has set up several innovative mechanisms that could be used in the future to restrain the executive branch: whether the Italian institutions, and especially the Constitutional Court, will be up for this challenge hereinafter remains, however, an open question.

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110 On the role of the judiciary *vis à vis* the other branches of government in the age of terrorism see F Fabbrini, 'The Role of the Judiciary in Times of Emergency: Judicial Review of Counter-Terrorism Measures in the United States Supreme Court and the European Court of Justice' (2009) 28 Ybk Eur L 664.